Supreme Court, U.S.
FILED
DEC 14 1992
OFFICE OF THE CLERK

NO. 92-1137

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PHILIP R. T. CARROLL, pro se,
Petitioner,

v.

THOMAS M. DOWNS, COMMISSIONER OF TRANSPORTATION,

HONORABLE HAROLD B. WELLS, III, A.J.S.C.,

NEW JERSEY TRANSPORTATION TRUST FUND AUTHORITY,

THOMAS M. DOWNS, CHAIRMAN, NEW JERSEY TRANSPORTATION TRUST FUND AUTHORITY,

D'ANNUNZIO AND SONS, INC.,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PHILIP R.T. CARROLL, pro se,

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Mount Laurel, New Jersey 08054

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December 12, 1992

QUESTIONS PRESENTED

1. In a 42 U.S.C. §1983 civil rights action alleging violation of constitutional rights to predeprivation procedural due process in the taking of property by a state, may a district court, on a motion for judgment on the pleadings, order the judgment after:

a. Ignoring without explanation the specific decisions of this Court upon which the complaint was based?;

b. Ordering judgment on a legal basis in direct conflict with the decisions of this Court upon which the complaint was based?;

c. Making a conclusive finding as tc whether or not constitutionally adequate procedural due process had been provided solely on the basis of the pleadings without a hearing thereon or a factual record before it?;

d. Making a conclusive finding as

to the constitutional adequacy of the procedural process afforded the owner without having applied the "balancing test" prescribed by this Court in Mathews v. Eldridge, 424 U.S. 319, 335, to determine what process was due?

2. With regard to the factual situation underlying this case, what predeprivation procedural due process protections was petitioner entitled to on the basis of the analysis and balancing test prescribed by this Court in Mathews?

3. Within the scope of Mathews:

a. May a state determine to acquire private property without considering the private interest of the owner?;

b. In the absence of circumstances such as emergency, exigency or inability, may a state determine to acquire private property without affording the owner any form of predeprivation procedural process whatever?

4. Does the exercise of eminent domain by a state completely extinguish all predeprivation procedural due process rights of the property owner?

LIST OF ALL PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Third Circuit are listed in the caption.

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No.

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Philip R.T. Carroll, requests that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit on August 19, 1992 which affirmed without an opinion the final judgment of the United States District Court for New Jersey which was entered on March 4, 1992.

A petition for rehearing was denied on September 14, 1992.

This petition for certiorari arises out of

the undisputed fact that petitioner was deprived of land by the State of New Jersey without pre-deprivation procedural due process of any kind.

OPINIONS BELOW

The Third Circuit did not issue an opinion.

On March 4, 1992, the district court filed a Memorandum and Order which is appended hereto as Appendix 2.

JURISDICTION

On August 19, 1992, the Third Circuit in a judgment order without opinion affirmed the March 4, 1992 judgment of the district court contained in its Memorandum and Order. The Third Circuit judgment order is appended hereto as Appendix 1.

A timely petition for rehearing with suggestion for rehearing in banc was denied on September 14, 1992. The order of denial is appended hereto as Appendix 3.

The jurisdiction of this Court rests upon 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priveleges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

This case involves the actions of the State of New Jersey in hostilely acquiring land owned by the petitioner, a private citizen, without having afforded him the constitutional predeprivation procedural due process protections to which he believes he is entitled pursuant to a line of decisions of this Court.

Without prior notice, petitioner received, under date of August 11, 1986, a letter from the state saying in part:

> "The above proposed public transportation improvement requires the purchase of property understood as being owned by you." (Emphasis added.)

On October 16, 1987, the state took possession of the land referred to by executing a declaration of taking. On October 22, 1987, the state commenced condemnation of the land by filing a civil action complaint in state court.

On May 14, 1991, petitioner filed a civil rights complaint in the United States District Court for New Jersey pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331 and 28 U.S.C. §2201 framing a single issue -- that the state had deprived him of his constitutional right to due process of law by determining to acquire his land without having afforded him prior notice, a hearing of any kind, any opportunity to present his objections nor any other form of due process.

The legal basis of the complaint was expressed in regard to a line of specific decisions of this Court:

Zinermon v. Burch, 494 U.S. 113

Cleveland v. Loudermill, 470 U.S. 532

Memphis v. Craft, 436 U.S. 1

Fuentes v. Shevin, 407 U.S. 67

Boddie v. Connecticut, 401 U.S. 377

Goldberg v. Kelly, 397 U.S. 254.

The cases cited reflected the concept or doctrine of constitutional law which this Court has developed prescribing requirements for predeprivation procedural due process to be applied when a state embarks upon the deprivation of liberty and property interests.

The complaint did not challenge the right of the state to acquire petitioner's land, its power of eminent domain nor any New Jersey statute. It was expressed solely as to the manner in which the state exercised its power and applied its laws without following a fair procedure and affording petitioner the predeprivation procedural

process to which he was constitutionally entitled pursuant to the decisions of this Court.

Although its statutory scheme per se may be constitutional, petitioner believes that the state has applied it in an unconstitutional manner, directing it solely to the public interest, but without consideration of the constitutional protections which it is obliged to provide private property owners.

The complaint was directed solely to the circumstances involving the taking of his land, but petitioner has become aware of the fact that his experience was not an isolated one, but that the due process deprivation was pursuant to the state's normal and established policy and practice and that the same deprivation is routinely imposed upon property owners, making the issue one of general public interest.

It is important to emphasize for an understanding of this petition that the petitioner had deliberately framed the complaint so as not to allege:

1. A right to a hearing per se;

2. A right to a hearing in advance to determine whether the taking of his property was necessary.

As related above, the allegations of the complaint merely referred to "a hearing of any kind" in relation to "any other form of due process". Petitioner was aware of only one case, Goldberg v. Kelly, 397 U.S. 254, supra, in which this Court had required a full evidentiary hearing prior to adverse governmental action.

On a motion for judgment on the pleadings, the district court granted judgment as to all defendants and ordered the complaint to be dismissed with prejudice in a Memorandum and Order dated March 4, 1992 (Appendix 2) based upon the "proposition" that:

> "It has long been the rule that the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking

is necessary.";

citing Government of Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566 (3rd Cir. 1976).

That legal "proposition" was irrelevant and inapposite to the complaint for the reason emphasized above -- that the complaint made no allegation as to "a hearing in advance to determine whether the taking of his property was necessary." Most significantly, however, that "proposition" was in direct conflict with the decisions of this Court upon which the complaint had been based.

Compounding the conflict was the fact that the district court failed to acknowledge it and and did not attempt to reconcile it. The court literally ignored and made no mention of this Court's decisions.

On April 1, 1992, petitioner filed a notice of appeal and on June 9, 1992 filed with the Third Circuit a brief on appeal from the judgment of the district court, contending that the defendants were not entitled to judgment on the

pleadings as a matter of law, that the district court had made procedural, legal and factual errors and that the court had no basis upon which to dismiss the complaint with prejudice.

In the appeal, petitioner argued inter alia that the district court had made an invalid due process determination and that the allegations of the complaint required resolution of the question of what due process he was entitled to by application of the analysis ("balancing test") prescribed by this Court in Mathews v. Eldridge, 424 U.S. 319, supra.

The appeal was considered on the briefs without oral argument on August 17, 1992.

On August 19, 1992 the Third Circuit entered a Judgment Order (Appendix 1), without an opinion, affirming the judgment of the district court.

On September 2, 1992, petitioner filed a Petition for Rehearing with Suggestion for Rehearing in Banc.

On September 14, 1992, the petition for rehearing was denied. (Appendix 3.)

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECIDED THE FEDERAL CONSTITUTIONAL QUESTIONS ON A BASIS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In affirming the judgment on the pleadings by the district court, the Third Circuit decided the federal constitutional questions raised by the complaint on a basis in direct conflict with the applicable decisions of this Court set forth in the complaint prescribing requirements for predeprivation procedural due process and which have been cited above in the Statement of the Case, page 6.

Those questions were unexplainedly ignored and the questions and issue were decided on the basis of an earlier Third Circuit case, Government of Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566, (1976), supra, the decision of which cannot be reconciled with this Court's decisions and, to petitioner's knowledge, has never been reviewed by this Court. Virgin Islands had been the basis of the judgment of the dis-

trict court, but the Third Circuit, by affirming that judgment without an opinion gave no indication that it had attempted to reconcile the conflicting decisions.

In effect, the decision of the Third Circuit allows New Jersey to immunize itself from this Court's predeprivation procedural requirements by asserting the power of eminent domain.

II. THE DECISION BELOW WAS WRONGLY DECIDED AS IT WAS BASED UPON AN EARLY POSTDEPRIVATION CONCEPT WHICH HAS SINCE BEEN IMPLICITLY REJECTED BY THIS COURT IN A LONG LINE OF CASES.

The Third Circuit affirmed without opinion the district court judgment and dismissal which had been decided on the legal basis or "proposition" of the earlier Third Circuit case of Virgin Islands, 536 F.2d 566 (3rd Cir. 1976), supra:

> "It has long been the rule that the due process clause does not require that a landowner whose property is to be condemned be given a hearing in ad-

vance to determine whether the taking is necessary."

That "proposition" had been paraphrased from the opinion of this Court in Bragg v. Weaver, 251 U.S. 57, 58-59 (1919). That case, however, had been decided on the premise that due process would be satisfied by a due process appeal, 251 U.S. at 59:

> "...due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal." (Emphasis added.)

That concept has been effectively rejected by this Court in development of its predeprivation procedural due process doctrine. As the Court stated in Zinermon v. Burch, 494 U.S. 113 at 132:

> "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so, regardless of the adequacy of a postdeprivation tort remedy to com-

pensate for the taking. See Loudermill, 470 U.S. at 542, 105 S.Ct., at 1493; Memphis Light, 407 U.S., at 80--84, 92 S.Ct., at 1994-96; Goldberg, 397 U.S., at 264, 90 S.Ct.,at 1018." (Emphasis added.)

Further, this Court has limited the instances in which post- deprivation process would be constitutionally adequate. In Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 at 436, 102 S.Ct. 1148 (1982) at 1158, the Court stated:

> "...the Court's decisions suggest that, absent "the necessity of quick action by the State or the impractibility of providing any predeprivation process," a post- deprivation hearing here would be constitutionally inadequate.";

and in Hudson v. Palmer, 468 U.S. 517, at 534, 104 S.Ct. 3194 at 3204, the Court stated:

> "The controlling inquiry is solely

whether the state is in a position to provide for predeprivation process."

In the proceedings below, the state made no claim that it was not in a position to provide predeprivation process.

III. REVIEW OF THE DECISION IS NECESSARY BECAUSE OF THE FAILURE OF THE THIRD CIRCUIT TO INQUIRE INTO THE CONSTITUTIONAL ADEQUACY OF THE PROCESS PROVIDED TO PETITIONER BY THE STATE.

The complaint alleged a constitutional violation.

In Zinermon v. Burch, 494 U.S. 113, supra, at 126, this Court stated:

> "...to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided and whether it was constitutionally adequate.";

and at 127:

> "To determine what procedural protections the Constitution requires

in a particular case, we weigh several factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and; the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)."

The district court did not make that prescribed determination and failed to balance the individual and state interests to decide what process had been due to petitioner.

On appeal, petitioner requested the Third Circuit to resolve the question as to what pro-

cess had been due to him by means of the Mathews v. Eldridge balancing test (referred to above in Zinermon v. Burch). Without explanation, the court did not do so. Therefore, it has become necessary for petitioner to present the question to this Court for resolution.

IV. PREDEPRIVATION PROCEDURAL DUE PROCESS IS COMPATIBLE WITH AND NOT INIMICAL TO THE POWERS OF THE STATE TO ACQUIRE PRIVATE PROPERTY.

Under normal circumstances of governmental planning and deliberation prior to acquiring privately owned property, the affording of predeprivation procedural due process to owners cannot adversely affect the interest or powers of a state. After considering the input of the owners, the state retains the ultimate discretion as to how it will proceed -- to modify its plans or to proceed by purchase or eminent domain .

If the circumstances are not normal, such as during the existence of an emergency, exigency or inability, the state may proceed with

minimal due process pursuant to the protection of the balancing test of Mathews v. Eldridge.

V. CALIFORNIA HAS DEMONSTRATED THAT IT IS POSSIBLE AND PRACTICAL FOR A STATE TO PROVIDE PREDEPRIVATION PROCESS IN THE ACQUISITION OF PRIVATE PROPERTY.

An example of a statutory scheme that accomodates predeprivation process with the state's ability and need to acquire private property may be found in California.

California's eminent domain law, §1230.030 leaves to the discretion of a condemnor the decision to acquire by purchase, other means or eminent domain. Pursuant, however, to §1245.220 and §1245.235, eminent domain may not be commenced until after the property owner has been given notice and a reasonable opportunity to appear and be heard. The eminent domain procedure law §201 requires, prior to acquisition, public hearings to inform the public about a proposed project; and §205 thereof provides for certain exemptions therefrom including the exis-

tence of an emergency situation.

VI. THE STATE HAS NO JUSTIFIABLE REASON FOR NOT PROVIDING PREDEPRIVATION PROTECTIONS TO PROPERTY OWNERS UNDER NORMAL CIRCUMSTANCES.

There is no legitimate or justifiable reason for the state not to afford procedural due process to property owners before determining to take their property. The state always has the initial opportunity to attempt to purchase property, which attempt may reasonably expected to be facilitated by prior notice, hearings and opportunity for the owners to object and make suggestions.

If the attempt to purchase is unsuccessful, the state nonetheless has the ultimate right to exercise its power of eminent domain.

In circumstances other than normal, the state is protected by the balancing test prescribed by this Court in Mathews v. Eldridge, 424 U.S. 319, supra. If there is an emergency, exigency or impractible situation, the balan-

cing test will actually sanction an acquisition with minimal predeprivation process.

VII. THE DECISION BELOW SHOULD BE OVERRULED TO INSURE THAT IN THE FUTURE PROPERTY OWNERS WILL BE GUARANTEED THEIR CONSTITUTIONAL PREDEPRIVATION PROCEDURAL DUE PROCESS PROTECTIONS AGAINST ARBITRARY STATE ACTION IN TAKING THEIR PROPERTY.

The decision of the Third Circuit has sanctioned, endorsed and will encourage New Jersey to continue its practice of arbitrary decision making and denial of predeprivation procedural due process to property owners in the hostile acquisition of their property.

In New Jersey, the state, its subdivisions, and agencies frequently and routinely determine and proceed to hostilely acquire private property. The majority of owners are private homeowners, farmers and small businesses. They include the poor, the elderly and the handicapped. They are largely uneducated and uninformed as to "takings" law, practice and procedure. They are

unorganized and most cannot afford the cost of engaging counsel to protect their interests in hostile bureaucratic proceedings, especially since the cost is not compensable under New Jersey Law.

It is when owners are in the categories described that they most need to be protected from the state. Constitutionally, of course, all property owners, regardless of status, are entitled to the predeprivation procedural protections prescribed by this Court. Neither the Third Circuit nor any other authority should be permitted to continue denying that entitlement to property owners in the future.

CONCLUSION

The Court should review this case not just in the interest of petitioner, but most importantly to protect the constitutional rights of property owners in the future.

Respectfully submitted,

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DATED: December 12, 1992

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT
No. 92-5187

PHILIP R.T. CARROLL,
Appellant

v.

THOMAS M. DOWNS:
HONORABLE HAROLD B. WELLS, III:
NEW JERSEY TRANSPORTATION TRUST FUND
AUTHORITY:
D'ANNUNZIO AND SONS, INC.

On appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 91-02112)
District Judge: Hon. John C. Lifland

Submitted Under Third Circuit Rule 12(6)
August 17, 1992
Before: SLOVITER, Chief Judge, HUTCHINSON and ROTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

s/ D K Sloviter
Chief Judge

Attest:
s/ Sally Mvros
Sally Mvros, Clerk
Dated: August 19, 1992

Appendix 1

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PHILIP R.T. CARROLL PLAINTIFF, V. THOMAS M. DOWNS, COMMISSIONER OF TRANSPORTATION, et al., DEFENDANTS.	CIVIL ACTION NO: 91-2112 (JCL) MEMORANDUM, AND ORDER

LIFLAND, District Judge

Defendants Thomas M. Downs, the Honorable Harold B. Wells, III, A.J.S.C. and the New Jersey Transportation Trust Fund Authority move for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). For the reasons set forth below, defendants' motion is granted.

BACKGROUND

Plaintiff, Philip R.T.Carroll ("Carroll") filed this suit pro se under 42 U.S.C. §1983 alleging that defendants violated his constitutional rights by depriving him of his property without due process of law. In his brief, Carroll states that he "will rely upon the procedural history and state-

ment of facts contained in defendants' letter brief." (Carroll Brief at 3).

Carroll was the owner of real property in the Township of Mount Laurel, New Jersey. His property abutted State Highway Route 38. On October 22, 1987, the State of New Jersey, by the Commissioner of Transportation (the " State"), instituted an action in the Superior Court of New Jersey to condemn a portion of Carroll's land in order to widen Route 38. Carroll was ordered to show cause why judgment should not be entered appointing condemnnation commissioners "to fix the compensation to be paid for the taking,....., inccluding the damage, if any, resulting from the taking to any remaining property...." State v. Carroll, 234 N.J. Super. 37 (App. Div.) 1989. The trial court ruled in Carroll's favor and the Appellate Division affirmed. The New Jersey Supreme Court reversed and remanded the matter to the Law

Division.

On remand, the Honorable Harold B. Wells, III, A.J.S.C. rejected Carroll's due process arguments and reinstated the State's complaint. Particularly relevant to the case before this court is Judge Wells ruling that: "The State has full authority to remove any and all trees within the area acquired through the complaint. The state shall give defendant Carroll reasonable notice as to the date and time of the removal of any and all trees." (Amended Complaint, Exhibit A.)

Plaintiff filed his original complaint in this action of May 15, 1991, contending that the defendants deprived him of his property without due process of law. On that same date, this court held a hearing on plaintiff's request for a temporary restraining order and a preliminary injunction against the defendants. The plaintiff sought an order which enjoined

the defendants from removing or destroying trees and shrubs growing on the lands previously owned by plaintiff. On June 17, 1991, this court denied the plaintiff's application. Subsequently, plaintiff filed an amended complaint adding the New Jersey Transportation Trust Fund Authority and D'Annunzio and Sons, Inc.[1] as defendants. All defendants have answered the amended complaint.

---

1. Defendant D'Annunzio and Sons, Inc. is named as a defendant by Carroll as a result of its contract with the state calling for the actual construction and widening of Route 38.

DISCUSSION

A motion for judgment on the pleadings under Fed. R. Civ. P. 12 (c) is not granted unless:

> the movant clearly established that no material issue of fact remains to be

> resolved and that he is entitled to judgment as a matter of law...viewing the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the non-moving party.

Hayes V. Community General Osteopathic Hospital, 940 F.2d 54, 56 (3d Cir. 1991), cert. denied, 117 L.Ed 2d 110 (1992).

For the purposes of this motion, the facts are undisputed. The question before this court is what process was due Mr. Carroll before his trees and shrubs were removed. Defendants cite Government of Virgin Islands v. 19.623 Acres of Land, (3rd Cir. 1976), for the proposition that:

> It has long been the rule that the due process clause does not require that a landowner whose property is to to be condemned be given a hearing in advance to determine whether the taking is necessary.

Id. at 570.

Mr. Carroll argues that the State is misrepresenting his position. He is not, he argues, contending that he was entitled to a pre-deprivation hearing. Rather, he alleges that he was entitled to some pre-deprivation due process.

The procedural history of the present case is long and twisted. Mr. Carroll and the State were involved in litigation in the state court which found its way to the New Jersey Supreme Court. Finally, after remand to the Law Division, it was determined that the State had duly exercised its power of eminent domain, and condemnation commissioners were appointed. Based upon Mr. Carroll's representation that he accepts the statement of facts and procedural history provided by the state defendants in their letter brief in support of this motion, this court finds it appropriate to grant the motion. Mr. Carroll was clearly

afforded due process by the state of New Jersey.

D'Annunzio and Sons did not join in the motion made by the state defendants. Nevertheless, the plaintiff's only claim against D'Annunzio and Sons is that their participation in the removal of the trees and shrubs deprived plaintiff of his property without due process of law. Based upon the undisputed facts relevant to disposition of this motion, the court finds that D'Annunzio and Sons is similarly entitled to judgment on the pleadings. Accordingly,

IT IS on this 4th day of March, 1992 ORDERED that judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c)is granted as to all defendants:

IT IS FURTHER ORDERED that plaintiff's complaint is dismissed with prejudice.

s/ John C. Lifland
John C. Lifland
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 92-5187

PHILIP R.T. CARROLL

V.

THOMAS M. DOWNS:
HONORABLE HAROLD B. WELLS, III:
NEW JERSEY TRANSPORTATION TRUST FUND AUTHORITY;
D'ANNUNZIO & SONS, INC.

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

The petition for rehearing filed by appellant, Philip R.T. Carroll in the above-entitled case having been submitted to the judges who participated in the decision in this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
s/ DK Sloviter
Chief Judge

Dated:
Sep 14 1992